No. 12,313

IN THE

United States Court of Appeals

For the Ninth Circuit

GUNNAR A. LARSSON,
Libelant and Appellant,

vs.

COASTWISE (PACIFIC FAR EAST) LINE,
Respondent and Appellee.

BRIEF FOR APPELLEE.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
233 Sansome Street, San Francisco 4, California,
Proctors for Appellee.

Subject Index

Table of Authorities Cited

Statutes

Texts

No. 12,313

IN THE

United States Court of Appeals

For the Ninth Circuit

GUNNAR A. LARSSON,
Libelant and Appellant,

vs.

COASTWISE (PACIFIC FAR EAST) LINE,
Respondent and Appellee.

BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT FOR APPELLEE.

The above entitled cause was heard by the Honorable Dal Lemmon, Judge of the United States District Court, all witnesses having appeared in person and having testified orally, no evidence having been adduced by way of deposition. We respectfully suggest to this Honorable Court that this appeal, which involves only issues of fact, is merely an attempt to obtain a trial *de novo*. This cause was fully considered by Judge Dal Lemmon on two occasions. On February 28, 1949, the Court filed a memorandum decision and order in favor of the libelant for maintenance in the amount of $21.00 and denied recovery for damages. Thereafter the Court made its *ex parte* order setting aside its memorandum decision and

order of February 28 and ordering the cause to be further briefed. Following re-submission the Court filed its order and opinion on May 24, 1949, affirming the previous award of $21.00 for maintenance to the libelant and again denying him recovery for damages.[1] Both opinions indicate the matter was carefully considered and appropriate weight given to all the evidence (Ap. 20, 26). It is not believed that this Court should or will try this case *de novo*. The law appears to be well settled that the trial Court is in a better position to judge the credibility of witnesses and give weight to the evidence when all such evidence is adduced by witnesses personally present.

In the case of *Catalina-Arbutus,* 95 Fed. (2d) 283, Judge Denman of this Court stated:

> "While this admiralty appeal is a trial de novo the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. *Ernest H. Meyer* (C.C.A.), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; *Silver Line, et al. v. United States, et al.* (9 C.C.A.), decided January 31, 1938, 1938 A.M.C. 521."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 Fed. (2d) 826, wherein it was said:

> "It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether

[1]Appellee does not contest appellant's right to the award for maintenance in the amount of $21.00.

there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this court."

To the same effect are many other cases, including:

"Heranger", 101 Fed. (2d) 953 (9 C.C.A.);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

Also in the case of *Tawada v. United States*, 162 F. (2d) 615, this Court enunciated the rule on this precise point as follows:

"(1) In an appeal in admiralty, where 'a substantial part of the evidence was heard in open court', the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness'. *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. 2d 506, 507, 508; *The Pennsylvanian*, 9 Cir., 149 F. 2d 478, 481. And, 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.' "

This Court succinctly stated the rule in *Stetson v. United States*, 1946 A.M.C. 900, 155 Fed. (2d) 359

(C.C.A. 9th), and in *Bornhurst v. United States,* 1948 A.M.C. 53 (C.C.A. 9th), as follows:

> "The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant.

Should this Court determine, in its wisdom, to hear this matter *de novo,* we submit the following in reply to the appellant's brief.

INTRODUCTION.

Gunnar A. Larsson, a former seaman of the Justo Arosemena, seeks recovery of damages for personal injuries allegedly suffered by him as the result of the appellee's alleged negligence. A libel was filed under the Jones Act, 46 U.S.C. 688, claiming that appellee negligently and carelessly caused a winch, which appellant was oiling, to start up without warning; appellee was additionally charged with failure to provide appellant with a safe place in which to work. The Justo Arosemena was a vessel owned by the United States of America. The Government had originally been joined as a respondent by appellant but was dismissed at the trial by a minute order. The vessel was bareboat chartered by appellee Coastwise Line which entered into a per diem charter party with the Board of Supplies, Executive Yuan of the Republic of China

(Ex. 2). Under the terms of this charter appellee's sole obligation was to deliver the vessel alongside designated wharves at her several ports of call and the right and obligation to discharge her rested with the per diem charterer. The vessel's voyage commenced at San Francisco on February 28, 1947, and terminated November 2, 1947 (Tr. 50, 51). The vessel in the course of her nine months' voyage called at Yokohama, Tinian, Guam and Shanghai on four occasions, and thence return to San Francisco (Tr. 11, 12). At all ports of call Chinese stevedores loaded and discharged the vessel with the exception of Yokohama, where the work was done by Japanese nationals (Tr. 6, 7, 8, 25, 32, 102). It is the practice to use native stevedores in all countries of the world (Tr. 25). Appellant suffered an injury while oiling a winch which was being operated by a Chinese winchdriver in the employ of the Board of Supplies, Executive Yuan of the Republic of China, the vessel's per diem charterer.

FACTS AND EVIDENCE RELATING THERETO.

Appellant, Gunnar A. Larsson, was an experienced seaman (oiler) 32 years of age (Tr. 50). At the time of the accident he had had nineteen years of sea experience and held a Swedish engineer's license (Tr. 67) and had sailed on American ships for some three years (Tr. 67, 68). One of the duties of an oiler on American ships is to oil and grease winches (Tr. 72, 52). This work is done while the vessel's winches are being used in the course of loading or discharging

the vessel. The Justo Arosemena was equipped with five sets of steam winches, ten in all (Tr. 53). The winches were oiled in six places and there were grease cups on each winch in approximately twenty places (Tr. 54). During the nine months' voyage the total time occupied in loading and discharging operations involved approximately three months (Tr. 33, 34). During the course of such operations, which were conducted hourly, these winches, according to appellant's own testimony, had been oiled and greased not less than 10,000 times by the members of the crew concerned with their operation. By mathematical computation—there being six places to oil and twenty to grease on each winch—at least 260,000 individual operations were performed on the vessel's winches during the course of her voyage, and despite the complaints of appellant as to the stevedores' conduct not a single other accident was suffered in connection with the winches during the entire voyage (Tr. 32, 33). This fact alone weighs heavily against appellant's contentions. The appellant himself oiled or greased the winches at least 1,000 times (Tr. 70) which would require 26,000 separate operations. The appellant was supported in part in his claims by one Herrera, the engine room union delegate. Herrera's testimony related largely to what he had heard from others, and while his recollection was fairly clear in some respects that favored Larsson's claim, he did not know the name of any of the vessel's officers nor did he know the names of the officers with whom he claimed he conversed, although he had been aboard the vessel for the entire voyage (Tr. 25,

26). He did not know the name of the officer in charge of the engine room or the officer in charge of the deck or where the Chief Engineer was at the time of an alleged episode that he described (Tr. 30, 31).

It took appellant between forty-five minutes and an hour to grease all the winches (Tr. 73); or to oil them alone, from ten to fifteen minutes (Tr. 74). On October 5, 1947, the day of his injury, Larsson serviced the winches during the stevedores' lunch hour, and the winch at which he was injured was the last to be worked upon by him on that round. When he came up to the winch the Chinese winchdriver was warming it up (Tr. 80). Appellant did not speak to the winchdriver but started to work on the winch after the winchdriver had given his "O.K." Appellant said nothing whatever to the winchdriver, merely showing him his grease gun before he commenced work. Appellant was working on the last grease cup when, according to his testimony, the winchdriver started up the winch, causing the grease gun to hit him on the wrist. Appellant did not know whether he had ever seen this particular winchdriver before (Tr. 81) and no one aboard the vessel could identify this particular winchdriver as being the one who had carelessly handled a winch before (Tr. 81). The appellant's witness Herrera admitted that he did not know whether the winchdriver that was operating the winch where Larsson was working was the one that had been operating the winches on the previous occasion three months before, nor did he recall seeing him aboard the vessel before or after the accident (Tr. 23).

Each of the vessel's ten winches is equipped with an individual shut-off valve which, if closed down prior to working on the winch, would completely immobilize the winch and make it entirely safe for anyone to work on or about it (Tr. 111, 112). Even appellant's witness Herrera admitted this fact (Tr. 39). After the valve is closed the winch cannot thereafter be operated until the steam valve is re-opened. The use of this valve is a proper way of immobilizing a winch and it is located within three feet of the winch's throttle (Tr. 112). It takes eight turns to completely close the valve which can be accomplished in less than a minute (Tr. 112). Upon the opening of the valve the winch can be put back into immediate operation (Tr. 113) It was within the discretion of the individual oilers as to whether they should completely immobilize any particular winch (Tr. 115). Once the valve had been closed the winchdrivers could not again start the winch (Tr. 112). All the witnesses admitted that there was no rule against using the valve to shut down the winch (Tr. 41). Appellant's witness, Houston, claimed that it was not customary for oilers to touch the valves. However, on re-direct examination, when asked by counsel for appellant if the valve were closed when working on the winch whether there would be anything to prevent the winchdriver himself from turning the steam valve back on again after the oiler had turned it off, this witness answered as follows: "No, there would be nothing at all to prevent it. *It happens in many cases.*" (Tr. 97). It was also claimed by this witness that these valves are only shut down when the

winchdrivers go to lunch or in the event an oiler has to make running repairs (Tr. 97). He likewise admitted that when the valves are shut down, such action is taken to prevent accidents (Tr. 100). The winches were in good order and condition and there was nothing the matter with them (Tr. 36).

ANSWER TO APPELLANT'S ARGUMENT.

I.

Appellant urges with unusual vigor that the Justo Arosemena was unseaworthy because of the alleged incompetence of the Chinese stevedores. There is not one iota of evidence even remotely tending to show that the stevedore operating the winch on the occasion of Larsson's injury had at any time during the entire three months of loading and unloading operations given any indication whatever that his handling of any of the vessel's winches was in any way improper.

Although, admittedly, while two previous experiences of difficulty were encountered with Chinese stevedores during the three months, there is not one word of evidence to connect the two prior episodes, which involved careless operation of the winches, with the winchdriver of the winch upon which appellant was working at the time of his claimed injury. There is nothing in the record which shows that the winchdriver with whom we are here concerned may not have been the best one in all of China. No acts of prior or later negligence were attributed to him even

by the appellant's most enthusiastic witnesses. How then, we inquire, could it be claimed that the shipowner had notice or knowledge of the alleged incompetence of this stevedore, an employee of the vessel's per diem charterer? The principal complaint against the winchdriver manning the winch at which appellant was injured is that he was Chinese, and the argument seems to be that by reason of his nationality he was per se incompetent because two other Chinese nationals (it may have been the one man on both occasions) had on two prior occasions, the first of which was three months before Larsson's accident, shown some evidence of negligence. We venture to suggest that more than one stevedore in the port of San Francisco is negligent and careless on any particular day. Is it not inappropriate to inquire whether such circumstance per se makes all American stevedores in the port of San Francisco negligent?

As pointed out, not a single other injury was suffered during the entire course of the vessel's nine months' voyage, three months of which were consumed in stevedoring operations. Doubt exists as to whether such an enviable record has been achieved in our local ports.

In support of appellant's ill conceived theory of liability he has cited *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 Sup. Ct. 872 (1946). In view of the tendency of all seamen to claim the *Sieracki* decision in support of their positions irrespective of whatever they may be, we respectfully submit that

that decision does not of necessity guarantee a recovery to all seamen in any amount, based upon any possible claim, no matter how fantastic. The Jones Act has not as yet become an unqualified all risk policy of unlimited insurance running in favor of all seamen claimants under all possible conditions. In *Seas Shipping Co. v. Sieracki,* supra, Sieracki was employed by an independent stevedoring contractor which was under contract to the Seas Shipping Co. to unload one of its vessels. The libelant was operating a winch and when a load on the boom was being lowered the shackle supporting the boom broke at its crown causing the boom and tackle to fall and injure Sieracki. The Court there held that the shipowner's obligation of seaworthiness extended to longshoremen. As noted, that decision was based upon facts far different than here. In the *Sieracki* case the ship's gear, while being used in the manner intended, carried away. We have no such problem even remotely touching upon such facts here.

In support of the same point appellant refers to the recently decided case of *United States v. Arrow Stevedoring Company,* 175 Fed. (2d) 329 (Petition for Writ of Certiorari has been filed and is now pending before the United States Supreme Court). As in the *Sieracki* case, supra, the accident was caused by an unseaworthy vessel and the action was predicated upon the failure of unseaworthy ship's gear which, in the *Arrow* case, was negligently used by the stevedores. There was nothing unseaworthy or improper about the Justo Arosemen or her winches. They were all in good

running order and condition. In the *Arrow Stevedoring* case the vessel owner admittedly had knowledge of the vessel's unseaworthiness. In the case at bar there were no unseaworthy conditions nor did the shipowner know nor could he have had any opportunity to ascertain or know that the winchdriver might at some time in the course of his whole career start a winch prematurely.

Appellant wanders far from his original premise in citing, on page 18 of his brief, *The Rolph,* 299 Fed. 52. As is well known to this Court, the facts in *The Rolph* involved the employment by the shipowner of an officer who was known to be of vicious and wicked propensities and of a most brutal and inhuman nature, demonstrated by previous acts.

Peninsular & Occidental S. S. Co. v. N.L.R.B., 98 Fed. (2d) 411, is not even remotely in point. This case came about when the steamship company brought proceedings to vacate an order of a National Labor Relations Board regarding unfair labor practices. *Spellman v. American Barge Line Co.,* 76 Fed. Supp. 1, merely stands for the proposition that whether a vessel is properly manned by an incompetent master and crew is a question for the jury. In *State of Maryland,* 85 Fed. (2d) 944, the Court held that it was negligence to fail to instruct a young and inexperienced seaman in his duties.

It will be noted that, contrary to the situation in the matter at bar, the relationship of master and servant existed in all the foregoing cases cited by appellant.

II.

Appellant in his brief (page 19) again argues that the case of *Seas Shipping Co. v. Sieracki,* supra, is controlling. We believe that we have shown that the *Sieracki* case is in no wise in point and not here controlling. Appellant would have this Court believe that by entering into a *per diem* charter, appellee did so for the sole purpose of closing American courts to him. Nothing could be more ridiculous. *Per diem* charters were a very common form of commerce long before the Jones Act was heard of and there is nothing unusual or uncommon about them. They are not entered into for the purposes claimed by appellant nor do they represent attempts of the shipowner to avoid his responsibilities through subterfuge. Appellant cites the cases of *Mahnich v. Southern S. S. Co.,* 321 U.S. 96; *DeZon v. American President Lines,* 318 U.S. 660; *Meyers v. Pittsburg S. S. Co.,* 165 F. (2d) 642, as standing for the proposition that a seaman who was injured through the negligence of a *fellow servant* is entitled to indemnity from his employer. We believe the rule that a seaman can recover for the negligence of a fellow servant is so fundamental that it needs no comment. Such, however, is not the case in the matter at bar.

Appellant, by an ingenious argument, seems to claim that a seaman libelant has neither the burden of proof of showing negligence upon the part of the ship nor its unseaworthiness. Indeed, under this test all that is required to recover damages is an injury of some sort and, *ipso facto,* the seaman acquires wealth. Ap-

pellant seems to insist that a shipowner is liable in the absence of his fault or negligence. In the absence of unseaworthiness we submit that the answer is so self apparent that it requires no argument. Additionally, we feel that appellant's complaint that because his injury was suffered in China and not elsewhere, deprives him of a right that he otherwise might have had against the allegedly offending stevedores is utterly without merit. It is not our concept that public policy will authorize a cause of action by an injured seaman against a vessel simply because it would be inconvenient for him to sue the party responsible for his injury elsewhere than in his home port.

III.

In support of his third argument (at page 24 of his brief), appellant again relies on *Seas Shipping Co. v. Sieracki,* which case we have heretofore distinguished. Additionally, he relies on *Francis v. Seas Shipping Co.,* 158 Fed. (2d) 584. A seaman aboard the vessel was required to man one of the vessel's guns during an air raid alarm. He was unable to reach his gun because the passageway from his bunk to the gun position was littered with dunnage upon which he slipped and fell, injuring himself. The jury found that the dangerous condition which existed, and which the master could have reasonably obviated in the interest of safety of the crew, constituted an unsafe place to work. The next case cited by appellant is that of *Shields v. United States,* 73 F. Supp. 862. We agree

with the conclusion of the Court and believe the case to be on all fours with the one at bar. *This case will be fully discussed later.* In *Kunschman v. United States,* 54 Fed. (2d) 987, the rule is laid down that an owner who lets the construction of an engine to an independent contractor is not responsible under the doctrine of *respondeat superior* for the negligence of such contractor or his servants unless the owner supervises the work and knows or should know because of such supervision that the engine was inherently dangerous. Here is a case cited by appellant that stands for the proposition for which we contend. In the instant case the shipowner did not know, and had no way of knowing, that the winchdriver, a third party's employee, might or would prematurely start his winch. In the case of *American Pacific Whaling Co. v. Kristensen,* 93 Fed. (2d) 17, cited on page 30 of appellant's brief, the ship there involved was equipped with a defective whaling gun which exploded injuring a seaman. That case does nothing more than to reiterate the elementary rule regarding the principles of law involved in "dangerous instrumentality" cases.

IV.

Under topic IV of appellant's brief (page 30) he again cites *Francis v. Seas Shipping Co.* which we have heretofore discussed and additionally cites *Mulligan v. Eastern S. S. Lines,* 170 F. (2d) 882, wherein it was held that whether the ship was negligent in respect to the condition and installation of a certain

turnbuckle was a question for the jury. The latter case simply declares the rule to be that the knowledge of the vessel's mate that the ship's gear is defective is imputed to the steamship company as a matter of law. These propositions appear to be elementary and require no further discussion.

It is not clear why appellant relies on *Pietryzk v. Dollar S. S. Lines,* 31 Cal. App. (2d) 584, 1939 A.M.C. 1281. To be sure, the case holds, as claimed, that if the shipowner negligently fails to discover and remove oil he is liable by reason of negligent failure to provide a safe working place. It is significant to note, however, that the shipowner must have been negligent in his failure to discover. The case further goes on to hold that the defense of independent contractor is entirely proper and consistent with the Jones Act:

> "The plaintiff does not call our attention to any authority to the effect that the function of cleaning oil tanks is inherently injurious, therefore the duty of performing such work could be delegated. In the absence of express language to the contrary in the Jones Act it did not have the effect of depriving this defendant of the right to rely on the defense that Ah Him was an independent contractor. (13 Cal. Jur. 1045; *American Pacific Whaling Co. ev. Kristensen,* 1938 A.M.C. 449, 93 F. (2d) 17, 20.)"

> "In 1908 the Federal Employers' Liability Act was enacted by the Congress. (45 Mason's U.S.C., sec. 51.) It modifies the rules applicable to common carriers in interstate commerce. As to seamen that statute was made applicable by the Jones Act. (46 Mason's U.S.C., sec. 688.) Under

> neither of said statutes was the defense of independent contractor expressly abolished. Nor do we find any language in either statute which by implication has that effect as to incidental matters such as cleaning of oil tanks."

At this point appellant again urges that because complaint had been made as to the conduct of two other winchdrivers (it may have been the same man twice) over the course of the three months of loading operations, the shipowner was thereby under constructive notice that the winchdriver at Larsson's winch would prematurely start his winch. We can understand the reason for appellant's persistent repetition of this claim. It is, of course, essential to his case, but the record is devoid of any prior or later claims of negligence upon the part of this stevedore. We are certain, as was the trial Court, that because one or possibly two stevedores on two other occasions (and no more) committed a negligent act, that such does not necessarily mean all the winchdrivers in Shanghai, or all the winchdrivers aboard this vessel were likewise negligent as a matter of law at all times.

Appellant makes the novel point that the master owed him the duty of protecting him to the extent that he should have been provided with an assistant or perhaps, we might suggest, an attendant. The record will show without contradiction that an oiler requires no assistant and such has never been customary or necessary. The implication is, of course, that this engineering officer (Swedish license) of 19 years' experience required a male attendant to show him how

to take eight turns on a small steam valve and thus insure his absolute safety. We think that the argument borders on facetiousness. We respectfully call the Court's attention to the fact that while appellant at page 35 of his brief refers to the "multitude of similar instances" there were but two shown or even testified to by the appellant and his witnesses. Whether two such instances over a long period of time constitutes a "multitude" we leave to the Court. Appellant on page 37 of his brief infers that because it would take one minute longer to make a winch absolutely safe to work on, that this safe practice was not followed because it would consume some of the shipowner's time. There is nothing in the record to show that the shipowner in any way hurried the operations and we believe the Court will take judicial knowledge of the fact that seamen of today are not overly concerned with the shipowner's time. The evidence as has heretofore been pointed out, is absolutely clear that it was a matter for the individual oiler's discretion as to whether he would completely immobilize the winch before working on it.

V.

In support of the theory that appellant was not guilty of negligence or contributory negligence he has of necessity misquoted the record and made statements that are unsupported by the record. Appellant on page 35 of his brief claims, albeit erroneously, that the "multitude of similar incidents," upon the part

of the Chinese stevedores clearly showed the propensity for prematurely starting the winches. He again claims such acts to have been performed "habitually and continuously". On the next page of his brief he supinely claims that he knew nothing of such acts or propensities and presumably therefore was under no compulsion or necessity to show any care whatever for his own safety. His principal argument in support of his claim that there was no negligence on his part, seems to be that it would have taken him one minute or possibly less to completely immobilize the winch and thus make it absolutely safe. There is not one scintilla of evidence in the record that the shipowner objected to this additional one minute of working time or that such would materially affect the ship's operation or would in any way violate the terms of the per diem charter. The fact of the matter is that the longer time the ship was under the per diem charter the longer the shipowner would continue to be paid by the charterer and thus any delay occasioned by the additional one minute would inure to the shipowner's benefit and would not be to his detriment, as the appellant would so artfully have this Court believe.

Appellant seeks freedom from fault by claiming that he was not told that he should close the steam valve. We deem it elementary that a man with 19 years of sea experience who holds a foreign engineer's license does not have to be told that he can stop a winch by turning a simple valve; any elementary grade student knows that it would be safer to work on a winch that had been immobilized than one which

had not. It is further argued that the trial Court found appellant to be negligent upon the basis of the case of *Shields v. United States, supra.* We respectfully submit that the Court made such finding upon the evidence adduced before it, as is clear from the Court's twice considered ruling. Appellant now urges that there is a complete absence of any evidence to show that he had any knowledge of the danger. If appellant did not know that it was possible for a winch-driver to prematurely start a winch then we respectfully submit his *abysmal* ignorance of what he should have known must in itself bar any right to recovery. The arguments of appellant on this phase border on the ridiculous. In support of his theory appellant cites the case of *Roberts v. United Fisheries,* 141 F. (2d) 288. This case involved the death of some seamen who were fishermen. They were fishing from dories when a storm came up and the master failed to call the dory fishermen back to the mother ship. The case holds that there is a question of fact as to whether the captain acted as a reasonable and prudent master under the circumstances. The question involved was one of whether proper or improper orders had been given or the lack thereof and it is in no way here enlightening.

VI.

Appellant in his brief under the caption "Public Policy", claims that he should have a recovery against the shipowner because he was hurt, and also because

his real cause of action against the Chinese stevedores is only illusory, presumably because it would have to be enforced in the Chinese Courts. Such right is far from illusory. Under the unique Chinese law, which would govern the appellant's right against the stevedores in this instance, the only question involved is that of ability to pay. The question of fault is not adjudicated nor at issue, the sole question being whether the plaintiff or the defendant is best able to pay. Assuming that this appellant has less funds than the Chinese Government he would be entitled to a recovery on the basis here urged against the shipowner, viz., that he suffered an injury. As usual, in support of his theory appellant has cited cases that are in no wise in point. He relies on *Koehler v. Presque-Isle Transportation Co.,* 141 F. (2d) 490, which is a case involving assault of one seaman upon another; the vicious propensity rule was applied. Reliance is likewise placed erroneously on the case of *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424. There a seaman sued for an injury received in a fall in the engine room caused by a defective step on which he stood while on duty when seeking to learn, by touching with his finger, whether an engine bearing was overheated. The Court applied the comparative negligence rule holding that both the vessel and the injured seaman were at fault. *State of Maryland,* 85 F. (2d) 944, has heretofore been commented upon. Suffice it here to say that the only proposition involved in that case was the liability on the part of the vessel for failure to instruct a green and inexperienced seaman as to his duties. Appellant alludes to the fact that

the shipowner could have provided against his liability, if any, by way of insurance; he also refers to the usual hold harmless clauses contained in the per diem charter. His reference to both can be regarded as having been made only for the obvious purpose of injecting the question of insurance into the case with the obvious intent and hope of prejudicing the outcome. Such tactics are not new to jury lawyers nor is their purpose unknown. It goes without saying, that learned judges are unimpressed by these improper methods. We should like to suggest, however, before passing the point, that had appellant been so insurance-minded he could have provided himself with all the accident insurance he cared to purchase.

THE FINDINGS OF FACT AND CONLUSIONS OF LAW ARE FULLY SUPPORTED BY THE EVIDENCE.

As previously pointed out Judge Dal Lemmon examined with meticulous care the law and evidence relating thereto in this matter. He filed one written opinion on February 28, 1949, and subsequent to the setting aside of the order which followed, the learned judge reconsidered the entire matter and filed a subsequent written opinion on May 24, 1949, affirming his previous decision. All of appellant's theories presented to this Court were urged in the Court below and appropriate Findings of Fact were made thereon. As to appellant's claim that recovery should be allowed because two prior episodes had been experienced with stevedores during the course of the

vessel's three months' loading and unloading operations, the Court very properly points out in its first opinion (Ap. 22) as follows:

> "The fact that difficulties had been encountered with Chinese stevedores on a prior visit to Shanghai and there had apparently been some difficulty the day before between a Chinese winch operator and a seaman is not sufficient in the absence of a showing that *this particular operator* was so inefficient as to constitute a hazard to justify classifying the ship as unseaworthy." (Emphasis supplied.)

Again in his second opinion (Ap. 29 and 29-A), it is stated as follows:

> "The factual situation presented herein does not justify a finding of negligence that would be imputed to respondent making it liable to libelant for damages. Taking the evidence most strongly in favor of libelant that on a prior trip difficulties had been incurred with Chinese stevedores and that on this voyage a member of the crew had trouble with another Chinese winch operator the night before the accident complained of herein, this is not sufficient to justify a finding that all Chinese stevedores are negligent or that it was foreseeable that *the particular stevedore* who caused the injury would prove to be incompetent. Negligence may not be attributed to the ship operator for the actions of a Chinese winch operator who until the accident had been operating his winch properly where the libelant had the means furnished to adequately protect himself from the possible contingency that the winch operator would negligently operate the winch when

the libelant was oiling the winch in plain view of the operator." (Emphasis supplied.)

Nowhere in the record is there a scintilla of evidence or even the slightest suggestion that the offending winchdriver had ever before shown any evidence of recklessness nor did he show any after the accident. The shipowner could not by any means have ascertained that this particular winchdriver was likely to or would prematurely start his winch and was utterly powerless to foresee such possible action; the only person who could have prevented it was the appellant himself who had the power, right and duty to immobilize the winch and make such action impossible. Appellant takes the position that because two of the very great number of stevedores in the three months' loading operations had each once been careless, the shipowner was on notice that all Chinese stevedores had reckless propensities and for that reason became the fellow servants of appellant and thereby imposed liability on the shipowner as the employer of the stevedores. As pointed out in our statement of facts the vessel's winches during the course of this voyage were serviced in at least 260,000 individual operations and the appellant himself oiled or greased the winches at least 1,000 times, which required him to service a minimum of 26,000 operating parts of the vessel's winches. We believe it is startingly significant that not a single other injury in the entire period was suffered by anyone in connection with the vessel's winches. This fact was testified to by the appellant's witnesses. At the risk of being thought repetitious,

we venture the belief that there is not one stevedoring contracting firm in America that has caused as few as two injuries in three months of operations, and that fact certainly does not prove that all American stevedores have reckless and careless propensities and are therefore per se negligent. Some point is attempted to be made by the appellant that Chinese stevedores conduct their operations somewhat differently than do American stevedores. It is safe to suggest that stevedores the world over differ in every port and in every country, and American efficiency cannot always be had in every foreign port. Such can hardly be charged as a fault of the concerned vessel and certainly cannot be attributed to the vessel's negligence. Appellant does not dispute the fact that each of the vessel's winches was equipped with an individual steam shut-off valve. If this valve is closed and the winch allowed to make a turn or two to allow steam in the piston to clear no stevedore or any human power can cause the winch to move or turn thereafter, and no one can doubt, and the evidence clearly shows that the safest, best and usual way to oil a winch is to first close the valve. If this is done no injury is possible. The appellant's witnesses admit that it was customary to close the winch in American ports during lunch hours or for other periods when the winch-driver was not at his post but the evidence was conflicting whether this was a customary practice while oiling. Chief Engineer Montague testified as follows:

"Q. Then would it be possible for that winch to move as long as the valve was closed?

A. No.

Q. Would that shut off all the steam in the winch?

A. That is right.

Q. Does each winch have a separate valve?

A. Each winch has a separate stop valve, yes.

Mr. Black. That is all." (Tr. 112.)

"Mr. Black. Q. Mr. Montague, it was up to the discretion of the individual oiler as to whether he shut down or not?

A. That is right." (Tr. 115.)

One of the appellant's witnesses, Houston, while denying that it was customary for oilers to touch the valves when oiling, was asked by counsel for appellant on re-direct examination if the valve were closed when working on the winch whether there would be anything to prevent the winchdriver himself from turning the steam valve back on again after the oiler had turned it off. His response was

"A. No, there would be nothing at all to prevent it. *It happens in many cases.*" (Tr. 97.)

The meaning of this answer could be only one thing and that is that the valve is closed in many cases while oiling and greasing even in American ports. Appellant's witnesses likewise admitted that there was no rule against the immobilizing of such winches. Appellant's witness, Herrera, testified as follows:

"Q. There is no rule against closing that valve?

A. That is something I don't know.

Q. Well, you represented the crew on the vessel. Was there any such rule?

A. No." (Tr. 41.)

As to the reasons for immobilizing the winches appellant's witness Houston further testified as follows:

"Q. That couldn't happen if the winch was shut off?

A. That is one purpose of shutting off the winches.

Q. Is it to make that more safe?

A. To see they don't run while there is nobody around.

Q. So an accident won't happen, is that right?

A. Yes.

Q. And that is the usual way of doing it, isn't it?

A. Yes." (Tr. 100.)

The trier of the facts in his second opinion set forth in Apostles 27:

"Libelant here, as libelant in the Shields case, knew about the shutoff valve on the winch and being a man of experience must have known that by its use his job would be rendered absolutely safe. The fact that libelant was not ordered to use the shutoff valve is not negligence upon the part of respondent. The ship owner performed its duty by providing a safe means of performing the work."

We see nothing whatever to libelant's claim that the shipowner failed to give him adequate protection. The shipowner put at appellant's disposal every device required to insure his complete safety and we urge to this Court that the appellant was under duty to take all reasonable means for the protection of his own safety and the greater the danger, the greater the ne-

cessity for care in the preservation of his own safety. As stated by the trial Court, Apostles 22:

> "It is not incumbent upon them to treat seamen as if they were in swaddling clothes and incapable of using a modicum of care for their own safety."

Even the seaman is required to use, at least to some extent, his faculties. While we dislike to dignify appellant's claim that the stevedore became his fellow servant because of the reckless propensities of one or two (it may have been the same one on two occasions) stevedores on earlier occasions, we respectfully submit that the general rule is that an employer of an independent contractor is not liable for the latter's negligent acts, unless perhaps the work contracted for is of an inherently dangerous nature and one calculated to result in injury.

Volume 27 of American Jurisprudence "Independent Contractors—Liability of Employer" discloses the following correct statement of law on pages 504, 505 and 506:

> "Generally—Although in some early cases it was thought that the doctrine of respondeat superior applied to the relation between an employer and an independent contractor, the authority of these few cases was soon overwhelmed by many decisions promulgating the general rule that an employer is not liable for the torts of an independent contractor or the latter's servants. This rule of the non-liability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is

that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. The general rule has also been said to rest upon the ground that a contractor, pending the performance of the work, is, to a certain extent, substituted for the person for whom the work is to be performed. However, the real basis for the rule seems to be public policy."

In the case of *Williams v. Fresno Canal and Irrigation Company,* 96 Cal. 14, decided in 1892, the Court held:

"When A makes an independent contract with B, by which the latter is to do for the former a piece of work in itself harmless, and B does the work so carelessly or unskillfully as to injure a third party, A, as a general rule, is not liable. But when the contract is in its very nature and necessarily injurious to a third party, then the doctrine of respondeat superior applies. In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all."

This has always been the law. See:

Shields v. United States, 73 Fed. Supp. 862, 1949 A.M.C. 1357 (C.A. 3);

Pietryzk v. Dollar Steamship Lines, 31 Cal. App. (2d) 584 at 592, 1939 A.M.C. 1281.

"As to seamen, that statute was made applicable by the Jones Act (46 Mason's U.S.C. sec. 688). Under neither of said statutes was the defense of independent contractor expressly abolished, nor do we find any language in either statutes which by implication has that effect as to incidental matters such as cleaning oil tanks."

See also the case of *Green v. Soule,* 145 Cal. 96:

"A building contractor is not liable for the negligence of another independent contractor employed by the owner to do the plumbing and sewer work; nor is he liable for the negligence of an independent subcontractor employed by himself to do the plastering for the building for a specified sum, who agreed to furnish all the materials and labor required to complete the subcontract, and who had the entire charge of that part of the work and sole control of the workmen engaged therein."

THE SHIELDS CASE IS CONTROLLING.

We respectfully cite to this Court the case of *Shields, et al. v. United States,* 73 F. Supp. 862 (D.C. E.D. Pa., 1947). The facts of that case were much stronger in favor of the seaman than is the factual situation in the matter at bar. While Shields and the appellee were injured in the same manner there were additional specifications of negligence proved in the *Shields* case which are absent in the instant case. In the *Shields* case:

"At No. 2 hatch were two large cargo winches, one on each side of the deck. Each winch had its

own separate control, or throttle, and each winch had a brake. For reasons of convenience, or possibly of economy of manpower, the stevedore had rigged a pair of long wooden handles by means of which one man standing between the two winches could operate both, either simultaneously or separately. This arrangement, the libelant contends, led to an improper method of operation which made it dangerous for a man at work oiling the winches, because the winch operator, standing between the wooden handles, would not be likely to see him unless he turned his head. At the time of the accident the operator was not looking and did not see that Shields was working on the winch, and his starting the winch without warning was one of the two prime causes of the accident, the other being Shields' thrusting of his hand through the flywheel. If there were nothing in the case, other than what has just been described, I would say that the method of operation made the Shields job a dangerous one."

None of the factual situations above referred to in the Shields opinion existed in the matter at bar, and eliminating such factors, the case is on all fours with the present matter. We can do no better than to quote from the opinion of the trial Court as to the facts which are, with the foregoing exception, the same as those claimed by the appellant herein.

"The libellant joined the steamship 'Hannibal Hamlin' as a member of the crew on September 18, 1944. At the time, longshoremen were engaged in loading cargo into the holds and the libellant was assigned to the duty of oiling the deck winches. *On the morning of the third day*

of his employment, while he was oiling the port winch at No. 2 hatch, the machinery was prematurely started by the winch operator, an employee of the stevedore, and the libellant suffered injuries which resulted in the amputation of his left hand and a degree of permanent impairment of the right." (Emphasis supplied.)

In the *Shields* case, there were individual shutoff valves at each winch, as there were in the case at bar. In this connection, the learned District Judge stated as follows:

"(7) *It is, of course, a breach of the employer's duty to put a man to work in an unsafe situation over which the man has no control. It is an entirely different thing when the workman has it in his power to make the place safe by a simple and ordinary precaution. The employer's duty must be measured by commonly accepted standards. Work has to be done on pieces of machinery of various types, particularly electrical apparatus, which are extremely dangerous unless they are rendered 'dead' by pulling a switch or closing a valve. In such cases the employer's duty to furnish a safe place to work is fully met if the switch or valve is there and the man knows how to use it—in other words, if the employer has supplied a reasonable and safe method of making the work perfectly safe. The fact that someone other than the workman can create a danger unless the workman takes the normal steps to make the machine safe does not make the employer responsible.*" (Emphasis supplied.)

The *Shields* case moreover, is interesting in light of testimony of appellant's witnesses, some of whom testified that they had never seen or heard of the safe practice of shutting the steam valves and thusly immobilizing a winch before working on it. The *Shields* case holds such a custom to exist.

Before arriving at the above-quoted conclusion and, thusly, dismissing libelant's libel, the Court had before it the case of *Seas Shipping Company v. Sieracki,* to which appellant devotes many pages of his brief. Judge Lemmon in the instant case also carefully considered the *Sieracki* case and held it inapplicable (Ap. 27-28-29). An examination of the *Shields* case will, we are confident, dispose of appellant's contentions in full.

The *Shields* case was appealed to the United States Court of Appeals, Third Circuit, and decision was rendered May 24, 1949, affirming the decision of the District Court. In its decision the Court of Appeals (1949 A.M.C., at page 1355) reviewed the facts and the law and stated as follows:

> "Appellant's main point is that appellee violated its duty in allowing the work to be done in a dangerous fashion and in failing to provide a safe place. We agree that the ship owner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo and engaged by the owner for that purpose. In this connection, as the district judge stated, the method employed by the stevedores in operating the deck winches, if considered by itself, might well be thought

dangerous to Shields in his job. The difficulty is that each winch on the deck of the *Hamlin* had a valve controlling the steam which powered the motor. Shields knew this; specifically he knew that shutting the steam off by turning the valve put the winch out of operation and he frankly stated that he had the right to shut off the steam if necessary in order to oil the winch. He did not shut off the steam to the forward port winch, the one which hurt him, prior to oiling it. Fifteen minutes prior to the accident, the operator of the starboard winch at Shields' direction, had shut off the power while Shields oiled it. In the situation we think it obvious that the district judge was correct in concluding that:

'3. *The respondent did not fail in any duty to supply a safe place for the libellant to work. The method of operating the winch adopted by the longshoreman did not render the place where Shields was working unsafe nor make it dangerous for him to oil the winch, so as to place any liability in respect of it upon the respondent.*' " (Emphasis supplied.)

Even the dissenting opinion by Chief Judge Biggs of the Court of Appeals held that Shields in failing to close the valve controlling the steam supply to the winch was guilty of negligence, but would impose some measure of liability on the shipowner because of the defective winch handle extensions, a factual situation which was not present in the matter at bar.

The *Shields* case being squarely in point, is completely controlling in the instant matter.

CONCLUSION.

We respectfully submit that the trial Court having heard all witnesses testify in person and having resolved all material allegations in favor of appellee and against appellant and being fully supported by the evidence, the decree for the reasons stated should be affirmed.

Dated, San Francisco, California,
November 18, 1949.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
Proctors for Appellee.